IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 337 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

PARTH PROJECT CONST.PVT.LTD. - Petitioner(s)
Versus
CORE HEALTHCARE LTD. - Respondent(s)

==========

Appearance :
MR DV PARIKH for Petitioner(s) : 1,
MR SN SOPARKAR for Respondent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 06/02/2007

ORAL JUDGMENT

1. This Company Petition has been filed by the petitioner – Parth Project & Construction Private Limited for an appropriate order of

winding up of the respondent company – Core Healthcare Limited under the provisions of the Companies Act; 1956.

2. It is the case on behalf of the petitioner that the petitioner company is in the business of designing, supervising and constructing Effluent Treatment Plant (ETP for short), Sewerage Treatment Plant (STP for short) and the respondent company is indebted to the petitioner in a sum of Rs.8,14,416/- together with interest at the rate of 18% amounting to Rs.13,38,000/-. It is submitted that the respondent company sought to put up a plant for the purpose of manufacture of medicaments, drugs, etc., and for that purpose they sought to initiate negotiations with the petitioner for putting up ETP and STP at Sachana. Accordingly, upon holding various discussions and negotiations, a proposal was made by the petitioner with regard to putting up of ETP and STP and two agreements were entered into, one with regard to turn-key job of putting up ETP and STP and the other with

regard to designing in that regard. It is submitted that for work an amount of Rs.89.50 Lacs was to be paid to the petitioner with regard to commissioning, erecting, etc., of ETP and STP. That contracts were duly entered into on 26.3.1996 between the petitioner and the respondent company as well as M/s. Encon Engineers and the respondent company. It is the case on behalf of the petitioner that as per the payment terms of the said agreements, 10% of the consideration was to be paid as advance, 10% against submission of drawings and 60% pro–rata against progress of work at site on running bills and proforma invoice for the equipments to be supplied. That the petitioner was paid an amount of Rs.17,90,000/- towards advance and against submissions of drawing vide DD No. 002580 dated 23.5.1990 by the said company. That accordingly the petitioner carried out various work at site and kept on submitting their running bills of work done at site as contemplated under the contract. It is submitted that running bill was submitted, however, there

was some dispute and therefore, the petitioner submitted revised bill of Rs.18,90,000/-. It is submitted that despite the fact that the aforesaid was duly passed, the company failed to make relevant payment as required under the contract. It is submitted that various letters and reminders were sent by the petitioner to the respondent company requesting them to make payment and the respondent company reassured on each occasion to the petitioner that the said amount would duly be paid, but the same has not been paid. It is submitted that even as per the company's account a sum of Rs.7,19,617/- is payable as on 23.1.1999. It is submitted that according to the petitioner, the amount payable is of Rs.8,14,416/-. It is submitted that the petitioner company has served a statutory notice upon the respondent and surprisingly the respondent company has come out with a case that the work done was of Rs.20,80,000/- and the company had made payment of Rs.23,67,000/- and has further raised debit note of Rs.5,97,000/- thus payment was made of Rs.29,65,000/- and that

the bill raised by the petitioner was for Rs.18,90,000/- and there was thus over payment. It is the case on behalf of the petitioner that the said reply is not only an afterthought but it is mala fide defence. It is submitted that the company is under liability to make payment as per the contract and having failed to do so, it is not open to them to raise any such issues which are not connected with the contract entered into between them. It is the case on behalf of the petitioner that the company was required to pay 10% against advance and 10% against submission of drawing as per the agreement and remaining amount of 60% as per relevant clause of the contract and the running bill was accordingly accepted and therefore, it is not open for the respondent company to raise the dispute of quantum of work in the manner as is sought to be raised in the reply. It is submitted that the respondent company has neglected to make the payment due and payable to the petitioner company and therefore, it is requested to pass an appropriate order of

winding up of the respondent company.

3. Affidavit in reply is filed on behalf of the respondent company opposing the present Company Petition. It is specifically denied that any amount as alleged by the petitioner company is due and payable to the petitioner. It is submitted that in fact, an over payment has been made by the respondent company to the petitioner company and in fact, the respondent company is a creditor of the petitioner and not a debtor. It is submitted that all issues were appropriately dealt with in the reply dated 21.4.1999 given by the company to the petitioner's statutory notice. It is, therefore, submitted that when the debts are not admitted and are disputed and there are justifiable reasons and the dispute is bonafide, it is requested to dismiss the present Company Petition. An additional affidavit is also filed on behalf of the respondent company with regard to the details of the payment made to the petitioner company.

4. Heard the learned advocates appearing for the respective parties.

5. It is the case on behalf of the petitioner that an amount of Rs.8,14,416/- together with interest at the rate of 18% p.a. amounting to Rs.13,38,000/- is due and payable by the respondent company against which, according to the respondent company, over payment has been made and the respondent company is a creditor and not a debtor. A statutory notice was served upon the respondent company and the respondent company responded to the said statutory notice and by reply dated 21.4.1999 submitted that the petitioner company had done work for an amount of Rs.20,80,000/- and against the aforesaid amount, upto 22.9.1997 the respondent company has made a payment of Rs.23,67,787/- and had also raised a debit note of Rs.5,97,596/- for supply of the material to the petitioner. Thus, a total amount of Rs.29,65,383/- has been paid to the petitioner as against the value of the work done by the petitioner amounting to

Rs.20,80,000/-. Thus, the debt itself is disputed and it appears that there are bonafide disputes which is right from the reply of the statutory notice. It is the case on behalf of the respondent company that in fact, the respondent company has to recover an amount of Rs.9,10,000/- from the petitioner. Now on considering the relevant documentary evidence on record, the averments in the Company Petition as well as reply to the statutory notice as well as reply, it appears to the Court that the debt is in dispute right from the very beginning and at least the dispute was in the reply to the statutory notice itself. Thus, the debt is disputed and it appears that there are bonafide disputes.

6. In the case of ***Pradeshya Industrial and Investment Corporation of Uttar Pradesh Vs. North India Petro Chemical Ltd. And Another, [supra],*** the Supreme Court has held that, ***"A debt for the purpose of Section 433(e) of the Companies Act must be a determined or a definite***

sum of money payable immediately or at a future date." In the said Judgment,the Hon'ble Supreme Court considered the following observations of the Hon'ble Supreme Court made in ***Madhusudan Gordhandas and Co.[1972] 42 Comp.Cases 125;***

> ***"Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corporation, In re [1875] LR 19 Eq.444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Brighton Club and Norfolk Hotel Co.Ltd., In re [1865] 35 Beav. 204).***

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chhoses not to pay that particular debt. (See A Company, In re [1894] 94 SJ 369; [1894] 2 Ch 349 (Ch D)). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. (See Tweeds Garages Ltd., In re [1962] Ch 406; [1962] 32 Comp Gas 795 (Ch D)). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding-up order by the creditors the court will consider their wishes

and may decline to make the winding-up order. Under section 557 of the Companies Act, 1956, in all matters relating to the winding-up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st edition, page 742, as follows :

"This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some goods reason, they object to a winding-up order, the court in its discretion may refuse the order.'

The wishes of the creditors will, however, be tested by the court on the grounds as to whether the case of the persons opposing the winding-up is reasonable; secondly, whether there are matters which

should be inquired into and investigated if a winding -up order is made. It is also well-settled that a winding-up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case. (See P & J. Macrae Ltd. In re [1961] 1 All ER 302; [1961] 31 Comp Cas 424 (CA).”

It is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P.) Ltd. vs. Krishnaswami (A.C.K.)[1965] 35 Comp Cas 456, 463 (SC) this court quoted with approval the following passage from Buckley on the Companies Acts, 13th edition, page 451 :

“It is well-settled that a winding-up petition is not a legitimate means of seeking to

enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmated as a scandalous abuse of the process of the court."

7. Similar view has been expressed by the Hon'ble Supreme Court in the case of ***Mediqup Systems Pvt.Ltd. [supra],*** and the Hon'ble Supreme Court has observed that, *An order under section 433(e) of the Companies Act, 1956 is discretionary. There must be a debt due and the company must be unable to pay it.* It is further observed that, *A debt under this section must be a determined or definite sum of money payable immediately.* It is also held that if the debt is bona fide disputed and the defence is a substantial one, the court will not pass an order of winding up the company. The Division Bench of this Court also in the case of ***Tata Iron & Steel Company Ltd. v. Micro Forge (India) Ltd., [supra]*** has laid down certain general principles in a case of winding-up proceedings and after considering

various decisions of the Hon'ble Supreme Court, more particularly in the case of ***Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt.Ltd. [supra]; Harinagar Sugar Mills v. Court Receiver, H.C. Bombay, AIR 1966 SC 1707; Pradeshiya Industrial & Investment Corporation of U.P. vs. North India Petrochemicals Ltd. 1994 (3) SCC 348,*** the judgment of the learned Single Judge of this Court in the case of ***American Express Bank Ltd. v. Core Health Care Ltd. 1999 (96) Comp.Cases 841;*** and another decision of this Court in the case of ***Ashok Fashions vs. Magdoot Acid & Chemicals (Guj.), 1998 (91) Comp.Cases 655,*** the order passed by the learned Single Judge admitting the winding up petition came to be set aside by holding that when there exists bona fide disputes and the dues are not admitted the winding-up petition is required to be dismissed.

8. Under the circumstances when the debt itself is disputed and the dispute is right from the beginning, the present petition is not required

to be entertained and hence, this Company Petition is dismissed.

[M.R.Shah, J.]

kdc